Filed 6/15/09 Allesandro v. Tecau CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VITO M. ALLESANDRO et al.,	
Plaintiffs and Appellants,	G039750
v.	(Super. Ct. No. 06CC05958)
ROBERT TECAU et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment and order of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed in part, reversed in part.

Dunn Appellate Law, Pamela E. Dunn and Mayo L. Makarczyk for Plaintiffs and Appellants.

Darling & Risbrough, Robert C. Risbrough, Robert M. Yoakum and Graham M. Cridland for Defendants and Respondents.

* * *

Plaintiffs Vito M. Allesandro and Beth Newhouse Allesandro discovered water and plant intrusion into one of the bedrooms of their home. After investigation, they determined that alteration of the side yard drainage pattern between their home and the home of defendants Robert Tecau and Judy Kalfin caused water to pond against the wall of the Allesandros' home, causing the intrusion. Believing defendants created the problem, plaintiffs sued for causes of action that included nuisance and trespass.

Despite plaintiffs' failure to designate any expert witnesses for trial, the trial court allowed two of plaintiffs' experts to testify, but limited one expert to providing percipient testimony only. The trial court also allowed defendants to call a rebuttal expert whom defendants failed to designate. During trial, the trial court granted plaintiffs' motion to amend their complaint to conform to proof by adding a cause of action for breach of the declaration of covenants, conditions, and restrictions (CC&R's) affecting both homes. The trial court later granted nonsuit on Vito Allesandro's claim for breach of the CC&R's upon learning he no longer owned the home and therefore lacked standing to enforce the CC&R's. The jury found in defendants' favor on plaintiffs' nuisance and trespass causes of action, and the trial court reserved decision on Beth Allesandro's claim for breach of the CC&R's.

The trial court entered judgment in accordance with the jury's verdict, but failed to decide Beth Allesandro's claim for breach of the CC&R's. The trial court granted defendants' attorney fee motion based on the CC&R's attorney fee provision after determining the nuisance and trespass causes of action sought to enforce the CC&R's.

Plaintiffs contend the trial court erred in limiting one of their experts to providing percipient witness testimony only and in allowing defendants to call an expert in rebuttal. Plaintiffs assert defendants previously had deposed both of their experts and therefore knew the basis of their opinions for their proposed testimony. Plaintiffs contend the court erred in allowing defendants' expert to testify because they did not

have an opportunity to depose him, and the expert based his observations on a visit to the property well after the discovery cut off date. Finally, plaintiffs contend the trial court erred in awarding defendants attorney fees based on an attorney fee clause in the CC&R's because nuisance and trespass constituted common law claims and were not based on enforcement of the CC&R's.

We conclude the trial court did not abuse its discretion by limiting the testimony of plaintiffs' expert or in allowing defendants' expert to testify. Trial courts have broad discretion in allowing or limiting expert testimony. Because plaintiffs failed to designate any experts, the trial court could have prohibited plaintiffs from presenting any expert testimony. Having allowed plaintiffs to use one expert, fairness dictated allowing defendants to use an expert in rebuttal.

We conclude, however, the trial court erred in granting defendants attorney fees. Although plaintiffs relied on the CC&R's at trial to define the parties' property rights, and the trial court allowed plaintiffs to amend their complaint to state a cause of action for breach of the CC&R's, the breach of contract claim was never adjudicated. Because none of the parties prevailed on this claim, the trial court erred in granting attorney fees to defendants under Civil Code section 1717. Accordingly, we affirm the judgment, but reverse the attorney fee order.

I

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and defendants live in neighboring parcels in a subdivision in Yorba Linda, constructed in 1979. Defendants bought their house in 1993, and plaintiffs moved into the house next door in 2001. The property line separating the two properties is located five feet from the sidewall of the Allesandros' house. The five-foot strip between the Allesandros' house and the property line is subject to an easement "for sideyard purposes" in favor of defendants.

Article XI, section 5(b) of the CC&R's states that the easement shall be "for the purposes of landscaping, fencing, drainage, the establishment of a general recreation or garden area and purposes related thereto . . . ." Section 5(b)(ii) and (iii) also states that, "The Servient Tenement shall have the right of drainage over, across and upon the easement area for water drainage from structure upon the Servient Tenement, or for drainage into and through the subsurface drainage facilities located within the easement area," and that "the Owner of the Dominant Tenement . . . shall not . . . disturb the grading of the easement area . . . ." It further provides: "The owner of the Servient Tenement shall have the right at all reasonable times to enter upon the easement area, including the right to cross over the Dominant Tenement for such entry, in order to perform work related to the use and maintenance of the Servient Tenement . . . ."

In late 2005, a tenant renting a room in plaintiffs' home complained about a musty smell and water on the floor. Vito Allesandro pulled up the carpet and opened the wall cavity, and found that water and plant roots had intruded into the bedroom from the side yard. Believing defendants had at some point changed the drainage pattern of the side yard, plaintiffs had defendants make several changes to the side yard, including capping sprinkler pipes and removing vegetation.

In February 2006, plaintiffs hired Carlos Valenzuela of C.V. Yates Associates to inspect the water intrusion in their home. Valenzuela examined water damage in the two bedrooms that border the side yard area, and took elevations of the grading in the easement area to "determine flow patterns and to investigate possible 'ponding' issues." Valenzuela concluded the side yard had been altered so that it no longer conformed to the city's grading plan. Based on the location of the water damage, Valenzuela deduced that the ground surface previously had been above the level of the

home wall's weep screed.[1] Valenzuela found the elevations in the easement area caused water to flow against defendants' home, instead of diverting it to a low point away from the house. He also found that water would pond at the bedroom where the majority of the drywall damage and water intrusion occurred.

Valenzuela recommended lowering the grade against the wall of defendants' house to a minimum of four inches below the weep screed; to regrade the earth in the five-foot easement area so that it sloped away from the house and toward the drainage swale on the property line; to regrade the swale line to conform with the grading plan, so that it would flow downward from a high point toward the street gutter; to add drains and inlets in the places where the drainage had been altered; and to move defendants' sprinkler system in the side yard away from the wall of plaintiffs' house. Plaintiffs forwarded Valenzuela's report to defendants. Plaintiffs also hired George Mehlmauer, a licensed general contractor, real estate broker, and seller of manufactured homes, who concluded the soil level in the side yard previously had been above the home's weep screed. He observed damage to the foundation, drywall, stucco, and weep screed.

Plaintiffs sued defendants on May 10, 2006, for negligence, trespass, and nuisance. Plaintiffs alleged defendants wrongfully regraded the side yard area, causing water intrusion and property damage to plaintiffs' home. Plaintiffs included a cause of action for quiet title, seeking to eliminate the easement on their side yard, and also sought injunctive relief to allow plaintiffs' engineers and contractors to enter defendants' property to fix the grading problems.

Shortly before trial, on June 4, 2007, a contractor hired by defendants began repairs to the side yard. Defendants specifically instructed the contractor to follow

---

[1] A weep screed is a device which ejects water from inside a stucco wall assembly, thereby preventing water intrusion from damaging the wall or the concrete slab.

Valenzuela's recommendations in repairing the property. Valenzuela inspected the repaired property on July 14, 2007, and defendants' expert, Thomas Davis, inspected the property on July 24, 2007.

Despite failing to designate expert witnesses for trial, plaintiffs sought to introduce the expert testimony of both Mehlmauer and Valenzuela. The trial court allowed Mehlmauer to provide expert testimony, but only on matters covered in his deposition without objection. The court precluded Valenzuela from testifying as an expert, but allowed him to testify as a percipient witness.

During trial, the court granted the Allesandros' motion to allow them to add a cause of action for breach of the CC&R's, noting that "a sufficient showing in the evidence has been made to show at least that a nuisance existed," and that "the defendants created or perpetuated the nuisance in violation of the CC&R's." Plaintiffs voluntarily dismissed their causes of action for negligence and quiet title. The court granted nonsuit in favor of Kalfin on all causes of action, with the exception of plaintiffs' injunctive relief claim. The court also granted nonsuit against Vito Allesandro on his claim for breach of the CC&R's because he had transferred his interest in the property to Beth Allesandro, and therefore lacked standing to enforce the CC&R's.

The court submitted to the jury plaintiffs' claims for nuisance and trespass, but concluded plaintiffs did not have a right to a jury determination on their claim for breach of the CC&R's because it constituted an equitable action. After deliberations, the jury answered "no" to the following three questions: (1) "Did Robert Tecau intentionally or negligently cause water or roots to enter Vito M. Allesandro and Beth Newhouse Allesandro's property"; (2) "Did Robert Tecau intentionally or negligently cause water and roots to enter Vito M. Allesandro and Beth Newhouse Allesandro's property"; and (3) "Did Robert Tecau have knowledge or notice that a prior owner had intentionally or negligently caused water and roots to enter Vito M. Allesandro and Beth Newhouse Allesandro's property."

After the verdict, the parties agreed the court would retain jurisdiction while the parties attempted to resolve the repair issue. After inspecting the repairs defendants made to the property, plaintiffs dismissed their injunctive relief claim against defendants, and the trial court entered judgment against plaintiffs. The trial court later granted defendants' attorney fee motion, awarding $73,026.76. The court relied on an attorney fee clause in the CC&R's, concluding: "Plaintiffs sought attorney fees through the CC&R's on all of the original causes of action and prevailed on none of them; the cause of action for breach of the CC&R's themselves was added only after trial briefs were filed; Plaintiffs withdrew their claim for injunctive relief before the court ruled; to the extent the court made any orders regarding remediation, they were to facilitate a final resolution to the parties' disputes and were not in the nature of relief for any particular party; the attorney fees were reasonable in terms of the work performed and the rates charged; cumis counsel fees were not unreasonably duplicative." Plaintiffs now appeal the judgment and the attorney fee order.

II

STANDARD OF REVIEW

"A court's decision to exclude expert testimony is reviewed for abuse of discretion." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.) The test for the abuse of discretion standard is whether the trial court's ruling "'exceeded the bounds of reason.'" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) We review an issue concerning entitlement to attorney fees de novo. (*Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 484.)

III

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Restricting Valenzuela's Testimony*

1. Plaintiffs Waived Their Argument That Defendants Failed to Make a Complete and Timely Compliance with Code of Civil Procedure Section 2034.260

In May 2007, defendants served a demand for exchange of expert witness information to take place on or before June 10, 2007. Neither side, however, designated expert witnesses. Nonetheless, plaintiffs later sought to introduce the expert opinions of Mehlmauer and Valenzuela at trial, asserting (1) the experts were percipient witnesses, (2) defendants had long been aware of plaintiffs' intention to call them as experts, and (3) defendants had previously deposed both Mehlmauer and Valenzuela about their expert opinions.

The trial court permitted plaintiffs to introduce expert testimony from Mehlmauer, but only on matters covered in his deposition without objection. The court, however, precluded Valenzuela from testifying as an expert, but did allow him to testify as a percipient witness. The court also precluded Valenzuela from testifying about his July 14, 2007, inspection of the property.

Code of Civil Procedure section 2034.260[2] provides, in relevant part: "(a) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange. [¶] (b) The exchange of expert witness information shall include either of the following: [¶] (1) A list setting

---

[2] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial. [¶] (2) A statement that the party does not presently intend to offer the testimony of any expert witness." Section 2034.300, provides in part: "[O]n objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260."

Plaintiffs assert defendants had not "made a complete and timely compliance with Section 2034.260" because they neither designated experts nor provided a statement that they did not intend to offer expert testimony. Thus, plaintiffs argue the trial court erred in excluding expert testimony from Valenzuela.

Plaintiffs raise this matter for the first time on appeal, and have therefore deprived the trial court of the opportunity to consider the issue. Plaintiffs, however, note that an appellate court has discretion to consider a new issue on appeal where it involves an issue of law applied to undisputed facts. (See *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 722, fn. 17.) But defendants' failure to comply with section 2034.260 is not an undisputed fact. Plaintiffs fail to cite any portion of the record showing defendants did not comply with section 2034.260. The only record citation they provide demonstrates that defendants did not designate any expert witnesses; it does not support the assertion defendants failed to serve a notice that they did not intend to call expert witnesses at trial. We therefore decline to consider plaintiffs' argument on this issue.

2. Plaintiffs' Limited Offer of Proof Regarding the Scope and Importance of Valenzuela's Expert Testimony Furnished the Basis for the Trial Court's Ruling

Plaintiffs also argue that even if the trial court properly considered defendants' motion to exclude Valenzuela's expert testimony, it abused its discretion in granting the motion because plaintiffs had not "unreasonably failed" to designate

Valenzuela under section 2034.300. Plaintiffs assert defendants were aware of Valenzuela's expert opinion and had deposed Valenzuela before trial. We do not find this argument persuasive.

Ample evidence supports the trial court's exercise of its discretion. The present case is not one where plaintiffs' counsel simply neglected to serve an expert witness declaration. Defendants served their demand for exchange of expert information on May 16, 2007. On May 22, 2007, plaintiffs sent a letter to defendant, which included the following representation: "I believe that there'll be at least 10 witnesses at trial. All of the people that will give technical testimony such as the civil engineer, the repair contractors and the doctors *are percipient witnesses in my opinion and need not be identified as expert witnesses* . . . ." (Italics added.) Thus, plaintiffs considered Valenzuela a percipient witness only, and maintained this position throughout pretrial proceedings because they never moved for leave to designate him as an expert under section 2034.710.[3]

Even when the trial court considered excluding expert testimony from Valenzuela, plaintiffs downplayed the importance of his expert opinion. Specifically, when the trial court determined it would allow Mehlmauer to testify as an expert, the following exchange regarding Valenzuela occurred: "THE COURT: . . . What expert opinion would you seek to get from Mr. Valenzuela that would be different from what you would seek from Mr. Mehlmauer? [¶] MR. NASTASE: He saw it at a different

---

[3] Section 2034.710 provides: "(a) On motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date. [¶] (b) A motion under subdivision (a) shall be made a sufficient time in advance of the time limit for the completion of discovery under Chapter 8 (commencing with Section 2024.010) to permit the deposition of any expert to whom the motion relates to be taken within that time limit. Under exceptional circumstances, the court may permit the motion to be made at a later time. [¶] (c) The motion shall be accompanied by a meet and confer declaration under Section 2016.040."

time. *It's not expert other than the fact that he is a surveyor and so the fact his ability to actually determine some compliance with the existing grading plan is something way beyond Mr. Mehlmauer's understanding and qualifications because he's not a surveyor*. [¶] *And I don't consider Mr. Valenzuela's observations of the topography expert testimony. His opinions as to the fact that water runs downhill, I think the jury can surmise when he says the ground was higher than the floor in the house, and, you know, I don't think that's really expert testimony.* I think people have a general understanding that water goes downhill, and that's really what his conclusion was once he did the survey and found the ground outside of the house to be higher than the floor elevation inside. *And these are observations.* [¶] *I know that his report concluded that the water flowed into the house, but that's a natural conclusion, to flow, once he determined what the grades were, and I think any reasonable person would conclude that*." (Italics added.)

Evidence Code section 354 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless . . . it appears of record that: [¶] (a) *The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means*." (Italics added.) The statutory offer of proof requirements allow the trial court to fully assess the proffered testimony and "provide[s] the reviewing court with the means of determining error and assessing prejudice." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) "[A]n offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*Ibid.*)

In their oral offer of proof, plaintiffs represented to the court that Valenzuela was "not expert other than the fact that he is a surveyor" and would provide an opinion whether the property's grading complied with the approved grading plan. When Valenzuela testified, however, he denied being a surveyor. Nonetheless, the court

allowed him to testify that the side yard grading on the subject property did not conform to the grading plan Valenzuela obtained from the city. In essence, plaintiffs obtained from Valenzuela the expert testimony they requested in their offer of proof, even though Valenzuela did not have the expertise as a surveyor claimed by plaintiffs.

Plaintiffs now complain that Valenzuela should have been allowed to opine specifically regarding the source of the water that entered plaintiffs' home because Mehlmauer was unable to provide this opinion. But plaintiffs did not make this argument to the trial court. Because plaintiffs failed to provide a written description of the opinions Valenzuela was to render, the trial court was forced to rely on the oral representations of plaintiffs' counsel quoted above. Based on plaintiffs' representations, we conclude the trial court not only acted reasonably, but also charitably toward plaintiffs. In sum, we cannot conclude the trial court abused its discretion in limiting Valenzuela's testimony.

B. *The Trial Court Did Not Abuse Its Discretion by Allowing Tom Davis to Testify Regarding His Inspection of the Property*

After Mehlmauer testified, plaintiffs moved to exclude the testimony of Tom Davis, defendants' expert, on the ground he had not been designated by defendants or deposed by plaintiffs. The trial court denied plaintiffs' motion, explaining: "[Plaintiffs] essentially asked the court for a dispensation for a failure to comply . . . , and I granted that. And Mr. Mehlmauer has been allowed to testify in this matter at length. [I]t would only be just to allow the defense to call their witness to rebut that." Plaintiffs contend the trial court abused its discretion in allowing Davis to testify as an expert and, in particular, to provide testimony regarding his observations of the property made after the discovery cutoff. We disagree.

True, plaintiffs were not notified before trial Davis would testify, nor were they provided the opportunity to depose him. But plaintiffs brought these disadvantages upon themselves. Had plaintiffs timely designated Mehlmauer as an expert, defendants

would have had the opportunity to designate Davis as a rebuttal witness, and, had defendants designated him, plaintiffs could have deposed him. Defendants, however, argued they did not designate Davis because they relied on plaintiffs' assertion they would call no expert witnesses at trial. When the trial court granted plaintiffs dispensation from their failure to designate any experts at trial, the trial court's decision to allow rebuttal testimony out of fairness to defendants did not exceed the bounds of reason.[4]

Plaintiffs complain the trial court precluded Valenzuela from testifying about a July 14, 2007, inspection of the property because it occurred after the discovery cutoff, but allowed Davis to testify about his July 24, 2007, inspection, and to introduce photographs of his observations. We reject plaintiffs' suggestion this amounts to an inconsistency warranting reversal.

Davis's July 24 inspection was his only visit to the property. Preventing him from testifying about that visit or introducing photographs would have prevented him from offering rebuttal testimony to Mehlmauer's opinions. Again, because plaintiffs failed to designate Mehlmauer as an expert, the trial court believed it fair to allow defendants to call Davis in rebuttal. Had plaintiffs timely designated Mehlmauer, the trial court might well have excluded any belated inspection by Davis. Moreover, there is nothing inconsistent about the trial court's exclusion of Valenzuela's July 14 inspection. Because plaintiffs apparently had planned to call Valenzuela in their case in chief, the

---

[4] We note that even if plaintiffs had timely and properly designated Mehlmauer, defendants still could have called Davis in rebuttal to the facts Mehlmauer relied upon. Specifically, section 2034.310 provides: "A party may call as a witness at trial an expert not previously designated by that party if . . . [¶] . . . [¶] That expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion." Much of Davis's testimony concerned the facts upon which Mehlmauer based his opinion.

trial court did not abuse its discretion in determining the inspection should have occurred before the discovery cutoff.

C. *The Trial Court Erred in Awarding Defendants Attorney Fees*

The attorney fee provision in the CC&R's provides: "In any legal or equitable proceeding for the enforcement or to restrain the violation of these covenants, conditions, restrictions, easements, reservations, liens or charges or any provisions hereof, the losing party or parties shall pay the attorneys' fees of the prevailing party or parties in such amount as may be fixed by the court in such proceedings. All remedies provided herein or at law or in equity shall be cumulative and not exclusive." An action to enforce CC&R's is considered to be an "action on a contract" under Civil Code 1717.[5]

In awarding attorney fees, the trial court noted that "[p]laintiffs sought attorney fees through the CC&R's on all of the original causes of action and prevailed on none of them . . . ." The trial court also noted plaintiffs withdrew their claim for injunctive relief before the court handed down its ruling. Plaintiffs contend the trial court erred when it determined the present case was an action to enforce the CC&R's. We agree.

"'In resolving a motion for attorney fees, the [trial] court should consider the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party's recovery. [Citations.]' [Citation.]" (*Lerner v. Ward* (1993) 13 Cal.App.4th 155, 158.) Thus, "even if a breach of contract is not specifically pleaded, an action may be 'on a contract' where, as here, the contract claim is asserted

---

[5] Civil Code section 1717, subdivision (a), provides in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

during trial 'and the [contract] theory . . . . [is] well known to court and counsel.' [Citation.]" (*Walsh v. New West Federal Savings & Loan Assn.* (1991) 234 Cal.App.3d 1539, 1547.)

A review of the complaint reveals that the only cause of action citing the CC&R's was for injunctive relief, seeking entry onto the side yard easement to perform remediation. Plaintiffs dismissed this cause of action, however, after defendants complied with plaintiffs' remediation request and the trial court expressly did not consider it in awarding fees. The two remaining causes of action that were tried to the jury were nuisance and trespass.

Common law nuisance and trespass claims are not actions "on a contract" and therefore do not support an award of attorney fees under Civil Code 1717. Defendants note, however, that plaintiffs relied on defendants' alleged violation of the CC&R's to support their nuisance and trespass claims. Specifically, plaintiffs' trial brief quoted section 2 of the CC&R's, as follows: "*Nuisance.* Neither the Properties, nor any portion thereof, shall be used for any purpose tending to injure the reputation thereof, or to disturb the neighborhood or occupants of adjoining property, or to constitute a nuisance, or in violation of any public law, ordinance or regulation in any way applicable thereto." In reference to plaintiffs' claim that defendants improperly fastened their fence to plaintiffs' home and changed the grading of the side yard, plaintiffs cited the following CC&R provision: "The owner of the Dominant Tenement shall have the right to construct fencing across the easement area, *provided that the Owner of the Dominant Tenement shall not attach any object or structure to a wall or dwelling belonging to the Servient Tenement or disturb the grading of the easement area or otherwise act with respect to the easement area in any manner which would damage the Servient Tenement.*" (Original italics.)

Moreover, plaintiffs quoted the following CC&R's provision in their trial brief to demonstrate defendants' actions constituted a nuisance: "The result of every

action or omission whereby any covenant, condition, restriction, easement, reservation lien or charge herein contained is violated in whole or in part is hereby declared to be and to constitute a nuisance, and every remedy allowed by law or equity against an Owner, either public or private, shall be applicable against every such result and may be exercised by the association or any Owner . . . ." Finally, defendants cited the CC&R's provisions allowing a property owner to enforce "all covenants, conditions, restrictions, easements" imposed by the CC&R's, and granting prevailing party attorney fees.

In accord with their trial brief, plaintiffs relied on the CC&R's in presenting its nuisance claim to the jury. Plaintiffs asked their first witness, Tecau, to read the "nuisance" provision from section 2 of the CC&R's. Plaintiffs then had Tecau read provisions regarding easements, access, and drainage. Plaintiffs also asked Tecau to read the CC&R's provision allowing a property owner to obtain injunctive relief and damages against another homeowner who violates the CC&R's. Finally, after complimenting Tecau on "a great job" in fixing the drainage issues shortly before trial, plaintiffs' counsel had Tecau read the CC&R's attorney fee provision to explain why plaintiffs had proceeded to trial after the nuisance and trespass had been abated. Based on the evidence presented to the jury, plaintiffs' moved to amend their complaint to conform to proof by adding a claim for breach of the CC&R's.

Thus, it is clear the CC&R's played a major role in the trial. But the critical question is whether defendants *prevailed* on the CC&R's. We conclude they did not. Although defendants used the CC&R's to define the parties' property rights, the trial court instructed the jury only on common law nuisance and trespass, and gave no instructions on breach of contract. The jury never heard the amended contract claim under the CC&R's because the court determined that it, rather than the jury, should hear the matter.

The court, however, never reached the merits of the breach of contract claim. True, defendants technically prevailed on Vito Allesandro's breach of contract

claim when the trial court granted nonsuit because for lack of standing. In the usual case, a defendant could recover attorney fees under Civil Code section 1717 based on a successful motion for nonsuit, even though the court determined the plaintiff could not enforce the contract (See *Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 545 [so long as "'one of the parties would be entitled to recover attorney fees under the contract if that party prevails in its lawsuit, the other party should also be entitled to attorney fees if it prevails, even if it does so by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract'"].) But here, the trial court simultaneously added and granted nonsuit on the breach of contract claim in the same minute order, as follows: "Court permits amendment conforming to proof to add Breach of the C.C. and R's as the 6th cause of action. Defendants[']' Motion for Non-Suit As Against Vito Allesandro for Lack of Standing is granted insofar as to the 6th cause of action for Breach of the C.C. and R's . . . ." Because the trial court added and dismissed Vito Allesandro's breach of contract claim simultaneously, the court's ruling had the same effect as denying leave to amend. Given that it would have been impossible for defendants to have expended any attorney fees in defending against the claim, holding Vito Allesandro liable for attorney fees based solely on his breach of contract claim would exalt form over substance.

Although the record is silent on the matter, defendants' counsel conceded during oral argument that Beth Allesandro abandoned her breach of contract claim after the jury returned its verdict. Civil Code section 1717, subdivision (b)(2), provides: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." (See *Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 Cal.App.4th 874, 877-878 ["Subdivision (b)(2) contains no temporal limitation; it 'bars recovery of section 1717 attorney fees regardless of when the dismissal is filed'"].) Although Beth Allesandro did not dismiss her breach of contract claim, her abandonment of it before entry of judgment

had the same legal effect. Because defendants did not prevail on the CC&R's, the trial court erred in awarding them attorney fees.

III

DISPOSITION

The judgment is affirmed. The order awarding defendants' attorney fees is reversed. The parties shall each bear their own costs for this appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.